No. 87-1810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ALVIN WARREN and ALFRED WARREN,

Petitioners,

v.

HALSTEAD INDUSTRIES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

James B. Spears, Jr.
Thomas A. Bright
Richard B. Kale, Jr.*

HAYNSWORTH, BALDWIN, MILES,
JOHNSON, GREAVES AND EDWARDS
The Gateway Center
901 West Trade Street
Suite 1050
Charlotte, N.C. 28202

ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

I. IN LIGHT OF THE SUBSTANTIAL EVIDENCE SUPPORTING THE EMPLOYER'S NONDISCRIMINATORY EMPLOYMENT DECISION, WAS THE TRIAL COURT COMPELLED TO REJECT THAT EVIDENCE IN FAVOR OF PETITIONERS' STATISTICAL EVIDENCE?

II. DOES THE BURDEN OF PROOF SHIFT TO THE EMPLOYER IN AN INDIVIDUAL DISPARATE TREATMENT CASE FILED UNDER TITLE VII AND SECTION 1981?

III. DOES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE MANDATE REJECTING ORAL TESTIMONY WHICH CLARIFIES INCOMPLETE DOCUMENTARY EVIDENCE?

PARTIES AND LIST OF AFFILIATED CORPORATIONS

The Respondent is properly identified in the Petition. There are no other affiliated corporations with an interest in this action.

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The Respondent, Halstead Industries, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth

Circuit's en banc opinion in this case. That opinion is reported at 835 F.2d 535 (4th Cir. 1988), and is fully set out in the Appendix to the Petition at pages 70a-73a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Petition properly identifies each of the statutes involved in this case.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners filed their action in federal district court alleging that Respondent discriminated against them in violation of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter

"Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (hereinafter "Section 1981"). Specifically, Petitioners alleged that they were denied promotions and discharged because of their race. They also claimed that they were retaliated against for filing administrative charges of discrimination with the Equal Employment Opportunity Commission and for complaining to management about racial discrimination. After a five-day trial, the district court entered judgment in favor of Respondent, dismissing the case. See, Petition, pp. 74a-121a. A three-judge panel of the Fourth Circuit Court of Appeals in part reversed the district court. See, Petition, pp. 1a-69a. After a timely petition for rehearing was granted, the Fourth Circuit Court of Appeals, sitting en banc,

reversed the decision of the three-judge panel and affirmed the findings and conclusions of the district court in all respects. See, Petition, pp. 70a-73a.

B. Statement of Facts.

The trial evidence fully supported the district court's findings of nondiscrimination and nonretaliation. Regarding the discharge claim of Petitioner Alvin Warren (hereinafter "Alvin"), the evidence established that Alvin was discharged for poor performance. Problems associated with Alvin's attendance, tardiness, and wasting time were documented and discussed with him during his probationary period. After Alvin's probationary period, he received progressive discipline for: (a) spending too much time away from his job by overstaying break and meal periods; (b) wasting

time; (c) failing to cooperate with supervisors; and (d) inadequate production. When Alvin failed to show improvement in these areas after proper disciplinary measures were taken, he was discharged. The evidence at trial showed that at least six white employees were terminated by Respondent for similar reasons.

The discharge of Petitioner Alfred Warren (hereinafter "Alfred") for poor attendance was likewise supported by the evidence. The testimony showed that Alfred's attendance problems were well documented and that his absenteeism and tardiness were excessive. Alfred's attendance problems began during his probationary period with Respondent and continued until he was discharged. Prior to his discharge, Alfred received

the normal progressive discipline, but his attendance did not improve. As a result, Alfred was discharged. It is important to note that the trial record showed that twenty-two other employees were similarly discharged by Respondent for attendance problems during Alfred's employment.

The decision of the lower court concerning Petitioners' promotion claim is likewise supported by the record evidence. Respondent promotes employees to leadmen positions on the basis of seniority. However, temporary upgrades to substitute for vacationing supervisors or leadmen are <u>not</u> based on seniority. Respondent's officials testified that Stephen Boles, an employee with less seniority than Petitioners, was temporarily upgraded for two weeks to a lead-

man's position as a substitute leadman. At the end of this temporary upgrade, he returned to his bench operator job, and he was not permanently promoted to a leadman position until after Petitioners' employment ended. While Boles' written service record noted the beginning of the temporary upgrade, it failed to note its termination when he returned to his bench operator position. The testimony of Respondent's officials ciarified this omission in Boles' service record. Thus, the evidence at trial clearly established that no white employee with less seniority than Petitioners was promoted to a leadman position.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Trial Court's Evaluation of the Statistical Evidence Complied With This Court's Prior Decisions and the Decisions of Other Circuits.

The first argument raised by Petitioners concerns the use of statistics in resolving individual disparate treatment claims of employment discrimination. Petitioners' argument is two-fold: (1) that there is a split in the circuits concerning whether statistical evidence alone mandates a finding of discrimination, and (2) this Court's prior decisions hold that evidence of gross statistical disparities mandate a finding of discrimination. Contrary to Petitioners' position, no circuit has embraced Petitioners' argument that sta-

tistics supersede all other evidence in an individual disparate treatment case. Likewise, the decisions of this Court support the trial court's consideration of the statistics involved in this case.

First, it is significant that the trial court did not reject the statistical evidence introduced by either party. After evaluating the statistical evidence presented, the trial court found that such evidence was not persuasive "in this case." See, Petition, p. 105a. By evaluating all the evidence, including the statistical evidence, the trial court adhered to this Court's guidance provided in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and International Bhd. of Teamsters v. United States, 431 U.S. 324, 97 S. Ct.

1843 (1977). As noted by this Court in Teamsters:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

431 U. S. at 340; 97 S. Ct. at 1856-57. This Court's decisions clearly do not mandate that statistical evidence be given controlling weight in an individual disparate treatment case.

Second, there is no split in the circuits concerning the use of statistics in an individual disparate treatment case. Each case cited in the Petition holds that statistics are relevant evidence for a trial court to consider in an employment discrimination action. However, none of the cases cited by Petitioners hold that a trial court must

ignore all other evidence presented in favor of the statistical evidence of one of the parties. Rather, these cases fully support this Court's mandate that a trial court consider all the evidence in resolving disparate treatment claims. See, Diaz v. American Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence relevant to creating inference of discriminatory intent); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 (9th Cir. 1981), cert. denied, 459 U. S. 823, 103 S. Ct. 53 (1982) (statistical evidence helpful in an individual employment discrimination case); Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir. 1987) (statistics constitute some evidence of discrimination in a disparate treatment case).

The cases cited by Petitioners are in full accord with this Court's decision in McDonnell Douglas. In that case, this Court noted that a plaintiff may utilize numerous types of evidence in an effort to show that the legitimate nondiscriminatory reason articulated by an employer is pretextual. The Court noted that statistical evidence is but one form of evidence that the employee might utilize:

> [S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

411 U. S. at 805; 93 S. Ct. at 1825 (emphasis added). However, this Court did not hold that statistics override all other forms of evidence and neither do the cases cited in the Petition.

Thus, there is no split in the circuits concerning the use of statistics in an individual disparate treatment case. More importantly, they do not hold that statistical evidence overrides all other evidence.

B. The Trial Court's Allocation of the Burden of Proof in This Individual Disparate Treatment Case Is Not in Conflict With This Court's Prior Decisions or the Decisions of Other Circuits.

The Petition's second argument is that there is a split in the circuits concerning the allocation of the burden of proof in a Title VII individual disparate treatment case. Petitioners cite cases from the Seventh, Eighth, Ninth, and D.C. Circuits which address the burden of proof in a mixed motive case.

However, this case is not a mixed motive case. Neither the trial court nor the Court of Appeals found a statutory violation which is a necessary predicate for any mixed motive analysis. Thus, those cases are inapposite.

The cases cited by Petitioners all stand for the proposition that the burden of proof may shift to the employer, but only at the remedial stage of a Title VII disparate treatment case. Once a court has found a violation of a nondiscrimination statute, an employer may still escape liability if it can show that notwithstanding the discrimination, the same employment action would have occurred. It is only at this remedial stage that the burden of proof shifts to the employer. As articulately

explained by the Eighth Circuit Court of Appeals:

> [O]nce the plaintiff has established a violation of Title VII by proving that an unlawful motive played some part in the employment decision or decisional process, the plaintiff is entitled to some relief . . . . However, even after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit the relief. The defendant may avoid an award of reinstatement or promotion and back pay if it can prove by a preponderance of the evidence that the plaintiff would not have been hired or promoted even in the absence of the proven discrimination.

Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (footnote omitted) (emphasis added).

The allocation of the burden of proof at the remedial stage of a Title VII case--after a finding of discrimination--is clearly different from the allo-

cation of the burden of proof necessary for resolving the threshold question of discrimination. The burden of proof on the initial issue of discrimination is clearly controlled by this Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). In that case, this Court clarified that the burden of proof remains at all times on the plaintiff to prove discrimination. The trial court here correctly applied Burdine. The only burden that shifts to the employer is the burden of articulating a legitimate nondiscriminatory reason for the challenged employment action. Id. at 252-53; 101 S. Ct. at 1093 (citations omitted). As noted by Justice Scalia while sitting on the Court of Appeals for the District of Columbia Circuit,

the holdings in those cases shifting the burden of proof to the employer at the remedial stage of a Title VII case do not apply to the allocation of the burden of proof as established in Burdine. Toney v. Block, 705 F.2d 1364, 1368 (D.C. Cir. 1983). Since the cases cited by Petitioners are inapposite, and since the allocation of the burden of proof in an individual disparate treatment case has been conclusively established by this Court, the Petition should be denied.

C. The Trial Court Did Not Misapply Rule 52(a) of the Federal Rules of Civil Procedure in Evaluating the Oral and Documentary Evidence at Trial.

Petitioners' final argument concerns the trial court's factual finding

that Stephen Boles' temporary two-week upgrade to leadman did not constitute discrimination against Petitioners. The district court noted that while Boles had less seniority than Petitioners, no discrimination was involved since the upgrade was temporary (two weeks) and in accordance with Respondent's established policy that seniority does not control such temporary upgrades.

Petitioners contend that this factual finding is contrary to Rule 52(a) and prior decisions of this Court since, in Petitioners' view, the oral testimony concerning the temporary nature of the upgrade allegedly conflicted with Boles' employee service record. Petitioners necessarily contend that the documentary evidence (Boles' service record) is the only evidence the trial court was per-

mitted to consider in evaluating the temporary or permanent nature of Boles' upgrade.

Rule 52(a) and prior decisions of this Court do not support Petitioners' contention. In clarifying the parameters of judicial review under Rule 52(a), this Court noted that it was the proper role of appellate courts to accept factual findings of a trial court where such findings are supported by the trial record viewed in its entirety:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511 (1985) (emphasis added). At no point, either in Anderson or in United States v. United States Gypsum Co., 333 U.S. 364, 396, 68 S. Ct. 525, 542 (1948), has this Court directed trial courts to favor documentary evidence over oral testimony. To the contrary, it has always been this Court's directive for trial courts to base factual findings upon the trial record as a whole.

In this case, the trial court properly followed the guidelines set out in Rule 52(a) and clarified in Anderson. The court noted the possible discrepancy between the oral testimony and the documentary evidence and reconciled it. See, Petition, pp. 81a-83a. In doing

so, the trial court noted that Boles' service record was incomplete and that the oral testimony adequately and credibly clarified the omission in that document. In reaching its factual finding that Boles' upgrade was only temporary, the trial court viewed all the evidence presented by the parties; it viewed the trial record in its entirety. This is precisely what this Court's decision in Anderson and Rule 52(a) require. Thus, no basis for granting the Petition is presented by this argument.

CONCLUSION

Based on the above argument and authority, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HAYNSWORTH, BALDWIN, MILES,
JOHNSON, GREAVES AND EDWARDS

James B. Spears, Jr.
Thomas A. Bright
Richard B. Kale, Jr.*

*Counsel of Record